Supreme Court, U.S.
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NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE OF* THE FOOD INDUSTRY ENVIRONMENTAL COUNCIL, THE NATIONAL RESTAURANT ASSOCIATION, THE AMERICAN COKE AND COAL CHEMICALS INSTITUTE, THE NATIONAL OILSEED PROCESSORS ASSOCIATION, AND THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether The United States Court Of Appeals For The Third Circuit Erred In Holding That Causation Is Not An Element Of CERCLA Section 107(a) Liability.

II. Whether the United States Court of Appeals For The Third Circuit Erred In Holding That Concentration Thresholds Are Not Implicit In The Definition of Hazardous Substances In CERCLA Section 101(14), Thereby Expanding The Definition To Encompass Everything In The Universe.

III. Whether The United States Court Of Appeals For The Third Circuit Erred In Shifting The Burden To Alcan To Prove The Absence Of Causation In Order To Limit Or Avoid CERCLA Section 107(a) Liability And Ease Government Enforcement Efforts.

IV. Whether The United States Court Of Appeals For The Third Circuit Erred In Requiring Alcan To Prove Its Emulsion As A Whole Was Environmentally Harmless In Order To Limit Or Avoid CERCLA Section 107(a) Liability, Even Though The Emulsion Contained None Of The Hazardous Substances Which Triggered EPA's CERCLA Response.

V. Whether The United States Court Of Appeals For The Third Circuit Erred In Ignoring Alcan's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Thus Failing To Apply To CERCLA The Strong Presumption Against Retroactivity In The Manner Articulated By This Court In *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994).

LIST OF PARTIES

United States of America, Plaintiff.

Alcan Aluminum Corp.; BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp., Dana Corp., Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Ingersoll-Rand; NEAPCO, Inc.; Rome Strip Steel Co., Inc.; Stanley Works, Inc.; TRW, Inc.; United Technologies, Defendants.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Food Industry Environmental Council (FIEC) is a coalition of trade associations and companies in the food processing industry. The member organizations of FIEC include, but are not limited to, the following associations:

- American Frozen Food Institute (AFFI) is the national trade association representing frozen food manufacturers, their suppliers, and marketers. Its members are responsible for approximately 90% of the frozen food produced annually in the United States valued at more than $60 billion dollars;

- American Meat Institute (AMI) established in 1906 is the nation's oldest and largest meat industry trade association with some 900 members. AMI represents the interests of packers and processors of beef, pork, lamb, veal and turkey products and their suppliers throughout North America;

- Grocery Manufacturers of America (GMA) member companies have sales of $400 billion dollars, representing the largest volume of all food and consumer packaged goods sold in the United States;

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[1]Both the Petitioner, Alcan Aluminum Corporation, and the Respondent, United States, have consented in writing to the filing of this *amicus curiae* brief in support of Petitioner. In addition, respondents Beazer Materials and Services, Inc., Exxon Corporation, and Ford Motor Company have also consented to the filing of this *amicus* brief. The letters of consent have been filed with this Brief.

- Institute of Shortening and Edible Oils (ISEO) is a trade association which represents the refiners of approximately 90-95%, or 17 billion pounds, of the edible fats and oils produced domestically;

- International Dairy Foods Association (IDFA) is an international trade association comprised of three organizations: Milk Industry Foundation, the National Cheese Institute and the International Ice Cream Association, and is affiliated with the American Butter Institute. Together these organizations represent 85% of the dairy products consumed in the United States;

- International Institute of Ammonia Refrigeration (IIAR) is a non-profit trade association which has 1100 member companies that range from small, family owned businesses to large corporate entities;

- Midwest Food Processors Association (MWFPA) represents processors of canned and frozen food products located in Illinois, Minnesota and Wisconsin;

- National Confectioners Association (NCA) and the Chocolate Manufacturers Association (CMA) represent 100 manufacturers and almost 300 other associated firms that produce the vast majority of chocolate and non-chocolate candy manufactured in the United States; and

- National Food Processors Association (NFPA) members include over 500 companies who manufacture $400 billion dollars of processed food products.

The National Restaurant Association (Restaurant Association) is the leading national association for the $290 billion food service industry in the United States. The Restaurant Association represents, *inter alia*, restaurant members, including fast food chains as well as traditional formal sit-down dining restaurants. The Restaurant Association's members number almost 30,000.

The American Coke and Coal Chemicals Institute (ACCCI) is a non-profit trade association that represents merchant producers of metallurgical coke (both furnace and foundry coke); coke sales agents; integrated steel producers; producers and processors of chemicals derived from the distillation of coal and coal tar; and suppliers to these various producers and processors.

The National Oilseed Processors Association (NOPA) is a trade association comprised of 13 regular and 25 associate member companies with plants engaged in the processing of vegetable meals and oils from oilseeds. NOPA's 13 regular member companies process an estimated 1.1 billion bushels of oilseeds annually at 67 plants in 22 states, employing an estimated 4,250 workers.

The interest of ACCCI and NOPA in this case stems from the fact that while the majority of their members' waste streams are non-hazardous in nature, the waste streams may contain trace compounds of elements that are defined as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (such as below background metals), which are naturally occurring and pose no threat to human health or the environment. ACCCI and NOPA are concerned that the Third Circuit's failure to focus on whether the hazardous substances in the Alcan Emulsion caused response costs at the Butler Tunnel Mine Site could result in its

members bearing the bulk of remediation costs caused by the wastes of other parties.

The National School Boards Association (NSBA) is a not-for-profit organization representing forty-nine state school board associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. The NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97% of all United States public school children.

Public schools in the United States are presently charged with one of this nation's most important responsibilities--the educational and personal development of our children. The goals of the NSBA are to educate our children in order that they can successfully compete in a global economy and participate in the growth of our nation in a manner that will almost certainly be far more demanding than in the past. Having been charged with this task, NSBA's members have not been immune from the financial restraints that have impacted NSBA's entire economy. In many respects, our members' difficulties have been exacerbated by the need to develop an expanded curriculum consistent with the need for global understanding, the need to participate in retraining programs as life-time careers become less likely, and the need to face the reality that the property tax base which is the primary income source for most of its members is becoming a strained resource.

The Third Circuit's ruling in this case is of serious concern to the NSBA and its members for a number of reasons. First, the Third Circuit's ruling poses the threat of substantial financial hardships on our public schools that has no reasonable relationship to any

harm they caused. Second, the standard adopted by the Third Circuit is inconsistent with responsible environmental policy. Finally, the Third Circuit's decision is in fundamental conflict with the underlying intention of the polluters pay scheme. By exposing schools to environmental liability for which they are not responsible, the Third Circuit has simply introduced into an already strained property tax base, environmental liability of others.

SUMMARY OF ARGUMENT

Amici strongly urge this Court to grant Alcan Aluminum Corporation's Petition for Writ of *Certiorari* for a number of reasons. First, the fact that there is no quantitative threshold associated with the definition of hazardous substance in CERCLA combined with the fact that there is no causation requirement, mean that virtually everything in the universe is a hazardous substance and liability is automatically imposed regardless of how innocuous the waste. This liability scheme is unreasonable and is not what Congress intended.

Second, the facts in this case present the legal issues of no causation, no limitations to the definition of hazardous substance as well as the issue of retroactivity in the clearest form possible. Therefore, this Court is presented with the opportunity to address and resolve these issues clearly.

Third, *Amici* encourage this Court to grant Alcan's Petition to protect the rights of those who are effectively denied their fundamental right of appeal due to the likelihood and extent of liability.

Lastly, *Amici* ask this Court to grant Alcan's Petition because this case presents the issue not only

of whether CERCLA may be applied retroactively, but whether it is Constitutional to apply the statute retroactively in a situation where Alcan is being held liable for the costs of remediating conditions not associated with its actions.

ARGUMENT

A. This Court Should Grant Alcan's Petition Because The Facts Leading To The Imposition Of Joint And Several Liability In This Case Are Not Unique To Alcan And, Therefore, This Case Has Wide-Spread Application.

The limitless definition of hazardous substance in CERCLA, which includes virtually everything in the universe, has been widely used to trap many of *amici's* members in the expansive CERCLA liability scheme. This is the case even though the likelihood was remote that the constituents of their waste streams were related to the environmental problems that triggered the CERCLA remediation.

CERCLA's present liability scheme is not limited to *amici's* industries or even business in general. In fact, the present state of the law has not permitted anyone to escape liability. For example, in one case in upstate New York, schools, meat markets, fabric stores, kennels, civic clubs, hardware stores, and even individuals were targeted as fourth party defendants in *New York v. Ludlow's Sanitary Landfill, Inc.*, No. 86-CV-853 (N.D.N.Y. filed July 24, 1986). A recent case in the Second Circuit, *B.F. Goodrich Co. v. Betkoski, et al.*, 99 F.3d 505 (2d Cir. 1996), sets forth a legal standard for liability that puts no limitations on CERCLA liability once again. In contrast with both the First Circuit in *Dedham Water Co. v. Cumberland Farms Dairy*, 889 F.2d 1146 (1st Cir. 1989) and the

Eighth Circuit in *Farmland Industries v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335 (8th Cir,. 1993), the Second Circuit has rejected specific causation as a requirement for the imposition of liability noting: "Significantly, it is 'not required that the [plaintiff] show that a specific defendant's waste caused the incurrence of clean-up costs.'" *Id.* at 514, quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). Unlike the Third Circuit, the Second Circuit in *Betkoski*, which involved private parties as well as the United States, apparently treats both private parties and the United States the same and requires neither to show causation, leaving it exclusively up to defendants to raise the issue of causation's absence and thereby shoulder the burden of proof in order to escape liability.

For many, the ability to escape liability is not an economically realistic alternative no matter how unlikely it is that their waste was related to the problems requiring remediation. The legal expenses associated with meeting their burden both with respect to lawyers and experts forces defendants to accept the best deal they are offered to avoid the risk of being held jointly and severally liable. As the facts of this case illustrate, that almost certainly means defendants will pay a share that is far in excess of any contribution their waste had to the harm at the site.

In addition, the Second Circuit in *Betkoski* reiterated and expanded the definition of hazardous substances to be totally encompassing. The district court, applying common sense, had rejected the notion that a party could be held automatically jointly and severally liable even though it disposed of a material that was not recognized as hazardous in any other context. Rejecting the notion that there were any quantitative limits to the definition, the Second Circuit, following the Alcan

doctrine, held that liability was immediate if the material contained any hazardous substance even if the material actually disposed itself posed no hazard. 99 F.3d at 517. Under this simplistic logic, used decaffeinated coffee grounds that had trace levels of TCE could be the basis for the immediate imposition of joint and several liability although no one could seriously contend the coffee grounds were hazardous.

The combination of these two legal notions, the absence of causation and a boundless definition of hazardous substance, create potentially devastating legal exposure to virtually everyone. Courts which have adopted this conclusion cite as a legal basis a legislative history that has been recognized as vague and contradictory at best. This reasoning is questionable and requires the thoughtful review of this Court.

B. This Court Should Grant Alcan's Petition Because The Facts Present The Issues In A Clear And Precise Manner.

The procedural context of this case, that is, that the district court's decision against Alcan was rendered in the context of a motion for summary judgment, eliminates any question of a factual dispute since reasonable inferences must be resolved in favor of Alcan. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In addition, the United States has not disputed any of the critical facts. The facts of this case are simple and straightforward. The only constituents that are the basis for CERCLA liability are trace metal compounds which are below background. The levels of these metals are lower than those present in air, garden soil, and many common foods. If there is any example that stretches the statutory meaning to its extreme, these facts certainly do.

Further, there is no metals problem of any kind at the site and none of the constituents that triggered the CERCLA remediation were contained in the Emulsion which was primarily water with a small percentage, five percent (5%), of mineral oil, a biodegradable oil similar to petroleum jelly, in suspension.

There is no causal connection between the constituents of the Alcan Emulsion and the constituents that triggered the CERCLA response action. Consequently, both the legal issues of causation and the appropriate extent of the definitional section of the statute are presented in the clearest form possible.

These facts also present the issue of whether CERCLA can be construed to apply retroactively consistent with this Court's direction in *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994) in the clearest fashion, since none of Alcan's actions would have resulted in liability prior to CERCLA's enactment. The contamination was at a third party site, not on Alcan's property. Alcan's actions were consistent with all legal standards, and to the extent it was paying to have its waste oil recovered at a state licensed recycler rather than simply discarded certainly establishes its conduct as exemplary for its time. Finally, there is no causal connection between the response costs at which CERCLA was directed and the Alcan Emulsion. In sum, without CERCLA Alcan would not be in its current situation of being liable for problems created by the wastes and malfeasance of others.

C. This Court Should Grant Alcan's Petition To Insure That The Thousands Who Are Being Abused As A Result Of The Liability Scheme Have An Effective Right Of Appeal Which Is Presently Denied Them By The Untenable Risk Of Joint And Several Liability.

One of the preeminent tenets of our legal system is that incorrect construction or interpretation of statutes is the subject of review by appellate courts and ultimately by this Court. This notion of appellate review is an integral part of our legal system. Yet, in the context of the Superfund liability scheme as applied by many courts, this right has no practical value because the enormous litigation costs and the potential for extensive liability have resulted in many forgoing their right to fair treatment and due process. Instead, many parties settle, accepting the best deal possible because of the economics. One Congressman has described Superfund as "a lottery system cloaked with the trappings of lawyers and courts designed to shake people down for money." (*Hearings before the Subcommittee on Commerce, Trade, and Hazardous Materials of the Committee on Commerce, House of Representatives, 104th Congress, First Session on Liability, Superfund Reauthorization (Part 3)*, June 22 and July 18, 1995, Serial No 104-54, Comments of Chair Michael G. Oxley, Ohio Representative, at p.2.) (Appendix A-1.)

The procedural history of this case demonstrates the time, money, and sheer will power required to sustain a Superfund lawsuit to the point that it is ripe for review by this Court. The claim for recoupment was initiated in 1985. This response action was initiated by the United States in 1989. Only after two hearings at the trial level, as well as two appellate reviews, is this case finally before this Court. It has been more than a

decade since the United States initiated its cost recovery actions. For most people, even large companies, absorbing the legal expenses for that period of time can be economically devastating. Add to that fact that the defendant must be willing to run the risk of liability disproportionate to its contribution to a site in an unpredictable legal climate in which the standard that will eventually be applied to a case, even after appellate review, is uncertain. This scenario practically forecloses effective appellate review.

The fact that Alcan has been willing to bear those costs and run the risks is remarkable. The fact that Alcan has done so to provide this Court with a unique opportunity to focus its attention on critical legal issues surrounding CERCLA presents a rare opportunity for this Court to exercise its review of a statute that has a troubled and controversial history. *Amici* strongly urge this Court to take this opportunity to review the compelling issues presented by this case. The likelihood that such an opportunity will present itself again is remote.

D. This Court Should Grant Alcan's Petition Because This Case Presents The Issue Of Whether The Retroactive Application Of CERCLA Under The Facts Of This Case Constitutes A Due Process Violation.

Alcan has raised the issue of whether CERCLA may be applied retroactively based on this Court's decision in *Landgraf v. USI Film Productions*, 511 U.S. 244 (1994), and the decision in *United States v. Olin Corp.*, 927 F.Supp. 1502 (S.D. Ala. 1996).[2] In

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[2]Alcan raised this issue by Motion in the Third Circuit. The Court, however, failed to acknowledge the Motion in affirming the lower court without opinion.

Landgraf, this Court held that the strong presumption against retroactivity may only be rebutted by clear evidence that Congress intended for the statute to apply retroactively. *Landgraf*, 511 U.S. at 262. In *Olin*, which is presently on appeal in the Eleventh Circuit, the district court held that CERCLA may not be applied retroactively under the *Landgraf* standard.

The facts of this case, however, also raise a Constitutional issue with respect to retroactivity, which is whether retroactive application of CERCLA under the facts of this case constitutes a due process violation. As this Court recognized in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976), retroactive legislation must satisfy the test of due process. Therefore, a statute cannot be applied retroactively unless there is a rational relationship between the retroactive application of the statute and the congressional purpose being forwarded. In this case, the Third Circuit held that the government does not have to prove causation in a CERCLA case. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 at 264 (3d Cir. 1992). However, the legitimate congressional purpose behind CERCLA is to require parties who caused environmental harm to pay for the remediation. This is the whole notion of the "polluters pay" scheme which is at the heart of the statute. Therefore, even if there is no causation requirement implicit in the statute, there must be causation in order for CERCLA to apply retroactively and comply with due process.

In this case, it has been established that Alcan's Emulsion did not cause and was not capable of causing the environmental harm responded to under CERCLA. Therefore, to apply CERCLA retroactively in the context of this case would violate the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, The Food Industry Environmental Council, The National Restaurant Association, The American Coke And Coal Chemicals Institute, The National Oilseed Processors Association, And The National School Boards Association request that this Honorable Court grant Petitioner Alcan Aluminum Corporation's Petition for Writ of *Certiorari*.

Respectfully submitted,

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A-1

SUPERFUND REAUTHORIZATION
(Part 3)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

LIABILITY

JUNE 22 AND JULY 18, 1995

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SUPERFUND REAUTHORIZATION

Liability

THURSDAY, JUNE 22, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND HAZARDOUS MATERIALS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:25 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Fields, Upton, Crapo, Bilbray, Frisa, White, Tauzin, Furse, Markey, Boucher, Manton, Brown, Lincoln, Stupak, Rush, Bliley, and Dingell.

Staff present: Nandan Kenkeremath, majority counsel; James Barnette, majority counsel; Hough N. Halpern, professional staff member; Richard A. Frandsen, minority counsel; and David Tittsworth, minority counsel.

MR. OXLEY. The subcommittee will come to order.

The Chair will recognize himself for an opening statement. At the center of any discussion about Superfund is its system of retroactive strict joint and several liability. The administration and others have told us that this system is effectively ensuring that the taxpayer is not saddled with the cost of cleaning up toxic waste sites. They argue that an army of lawyers at the Department of Justice or in the States should make liability retroactive for conduct that was legal or even state-of-the-art management. They argue that

only minor fixes are necessary and that somehow the Superfund liability scheme is necessary for justice and fairness.

Unfortunately, the Superfund's record tells us a far different story. It isn't the polluter who pays when businesses are forced to close their doors because of liability that not only predates the current owners but anyone still alive who ever worked at that company. It isn't the polluter who pays for huge tracts of land that lie underdeveloped because of the fear of environmental liability. And it isn't the polluter who pays higher prices for goods, services, and insurance policies because virtually every business in America is a potential target of a Superfund lawsuit. Rather, it is the American consumer and taxpayer who pays for Superfund through higher prices, lost opportunities, and slowed economic growth.

We can no longer justify the absurd consequences of the Superfund liability system. Every aspect of the Superfund liability system must be reexamined as if we were writing the law for the very first time. Some would argue that only lenders need relief or only small businesses or recyclers. The simple fact of the matter is that single issue fixes do not address the fundamental problem of Superfund: that it is a lottery system cloaked with the trappings of lawyers and courts designed to shake people down for money. Its effects are so bizarre because Superfund's liability system is built on a premise as un-American as any I know, that you are guilty until proven innocent.

Moreover, in the name of making the polluter pay, Congress has imposed a system of wave upon wave of litigation ensuring the highest transaction cost of any environmental program.

At prior hearings we have noted that the amount of man-hours devoted to Superfund by enforcement lawyers at the Department of Justice exceeds all other environmental programs for the years 1990 to 1992 by a wide margin. This year alone the Department of Justice has allocated over $32 million a year from the Superfund budget for that purpose. This funding is in addition to the almost $200 million that EPA admits that it spends on its own enforcement activities. Superfund really is a lawyer's dream come true.

As I have indicated in the past, the idea behind Superfund is not to make the program a scholarship program for lawyers' kids but in fact to clean up the program and to clean up the dump sites, as we have tried to do.

We have also noted that there is an inordinate amount spent on noncleanup spending for fiscal year 1995 at NPL sites versus actual money for cleanup. Federal noncleanup spending includes the cost of PRP and insurer litigation and transaction costs of over $1 billion in Federal Government Administration and overhead costs of some $680 million. This is just for the fiscal year.

A study by the Rand Corporation indicates that 36 percent of the approximately $11.3 billion spent by the private sector at Superfund sites through 1991 went to transaction costs rather than cleanup. Last Congress Mr. Dickerson from ARCO, a witnesses, noted that his company was liable in cases because of the acquisition and subsequent sales of companies over 80 years ago.

What is the fundamental notion of fairness or justice in this scheme? Why should we devote so much of the legal system and the resources of American business to support it? Clearly this liability

system must change. We are committed to changing it this year one way or the other. That is why Chairman Bliley, Chairman Schuster, and I have asked the appropriators to stop funding for Superfund beyond December 31 if we have not passes reform legislation. We will not have a Superfund program that is not fair and reasonable. Substantial reform and creative solutions are what is necessary to fix this program. I hope that our witnesses will join us as we try to develop those solutions, and I look forward to hearing the testimony today.

With that, I recognize the gentleman from Massachusetts, Mr. Markey, for an opening statement.

* * * *